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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

YOSI ALMOG et al., Plaintiffs and Respondents, v. KARSTEN MUELLER, Defendant and Appellant.	H032984 (Santa Cruz County Super. Ct. No. CV155100)

I. INTRODUCTION

Plaintiffs Yosi and Ayelet Almog and defendant Karsten Mueller were three of several buyers involved in the purchase of four adjacent, undeveloped parcels of real property in Santa Cruz County. Plaintiffs bought two of the parcels; defendant bought one; other persons not parties to this lawsuit bought the fourth. The buyers each purchased their lots on the same day, intending to revise the common lot lines after the initial sales were complete. Not surprisingly, a dispute eventually arose concerning the lot line changes. Plaintiffs claimed that defendant was responsible for accomplishing the changes and that he had failed to do so. Plaintiffs sued defendant alleging causes of action for breach of contract and fraud. While the litigation was pending, the lot lines revisions were finalized and recorded. Plaintiffs dismissed the suit, without prejudice, approximately two months thereafter.

Defendant moved for an award of attorney fees based upon the attorney fees clause contained in one of the several agreements pertaining to the transaction. The trial

court awarded defendant his costs under Code of Civil Procedure section 1032 but denied his motion for attorney fees, finding, among other things, that the dispute did not arise out of an agreement that contained an attorney fees clause and that neither party had prevailed in the action. Defendant appeals from that order. We conclude that, even if the action was subject to an attorney fees provision as defendant maintains, the trial court did not abuse its discretion in denying the motion on the ground that there was no prevailing party. Accordingly, we shall affirm.

II. FACTS

In or around the fall of 2004, defendant became aware of an opportunity to purchase four adjoining parcels of undeveloped property on Ocean Street Extension in Santa Cruz County. The parcels, which together comprised approximately 10 acres, were designated as assessor parcel Nos. 060-141-27 through 060-141-30 (Parcels 27-30). The existing lot lines divided the 10 acres unevenly; three of the parcels were much larger than the fourth. The land owner, John Swift, had prepared a map (the Swift map), which revised the lot lines to make the lots more equal in size and designated the revised lots as lots "A" through "D." The lot lines as shown in the Swift map were never finalized, however.

Kurt Clotfelter had an option to buy the four lots. He ultimately decided not to buy the land and assigned his option to defendant. Defendant was interested in creating a "green community" on the property but the purchase price for all four parcels was more than he could afford on his own. Defendant solicited persons to join him in the venture and plaintiffs responded in early December 2004, expressing interest in purchasing two of the lots. Other persons stepped up to buy a third.

Clotfelter's option required escrow to close by January 5, 2005, so the buyers were pressed for time. Because Swift wanted to make a single sale to one buyer, the buyers decided that the purchase would be accomplished with a double escrow; defendant would purchase the four lots and immediately transfer, at his cost, two lots to plaintiffs and one

lot to the other buyers. He would keep a fourth lot for himself. The buyers intended to revise the existing lot lines to give each parcel at least 2.5 acres. Given the time constraints, the buyers agreed that the revisions would be made after the close of escrow, using the Swift map as a starting point.

On December 17, 2004, plaintiff Yosi Almog and defendant signed a document, referred to as the "Deposit Agreement," which provided that plaintiff was to buy "parcels C and D" from defendant for $1.1 million. The Deposit Agreement included other promises about the properties, did not provide for attorney fees in the event of a dispute, and made no mention of any other agreement.

A "Vacant Land Purchase Agreement and Joint Escrow Instructions" (the Purchase Agreement), also dated December 17, 2004, reflects plaintiff Yosi Almog's offer to buy "Ocean St. Ext–Proposed Lots C & D" for $1.1 million, with escrow to close on January 5, 2005. The purchase was conditioned upon the "sale of 4 parcels in sales agreement between Kurt Clotfelter and John Swift." The Purchase Agreement contained numerous standard clauses, including an attorney fees clause. It did not refer to or expressly incorporate the Deposit Agreement.

The double escrow was accomplished and plaintiffs received title to Parcels 27 and 28 as originally configured. There followed lengthy disputes among the several buyers over the location of the new lot lines, the terms of an owners' agreement, the location of a road, and other things. The parties finally agreed upon the lot line adjustments in April or May 2006 but disputes concerning the owners' agreement continued. One or more of the owners refused to finalize the lot line changes absent a recordable owners' agreement.

On August 25, 2006, plaintiffs filed the instant lawsuit against defendant for breach of contract and fraud. According to plaintiffs, they could not build upon their property until the lot lines were changed. Without identifying any particular written contract upon which the lawsuit was based, plaintiffs alleged that defendant had promised

to convey specific property and that he had not done so and had never intended to do so. Plaintiffs sought restitution of the purchase price and rescission of the agreement, damages of $300,000 for the loss of use of the $1.1 million purchase price, punitive damages, and specific performance or rescission. Defendant denied the allegations of the complaint and prayed for attorney fees.

In the meantime, after the parties had agreed upon the lot line adjustments, defendant began arranging for a survey of the property. He received a bid for the survey work in July 2006. The record does not reveal the date upon which the surveyor was engaged but it does show that the survey was completed in November 2006, after this lawsuit was filed, and that the application for the lot line changes was submitted to the County that month. The deeds memorializing the conveyances were recorded on August 23, 2007.

Even after the August 2007 recordation of the deeds revising the lot lines, plaintiffs continued to take discovery in this case, including the taking of defendant's deposition in October 2007. Finally, on November 1, 2007, just days before trial, plaintiffs dismissed the lawsuit, without prejudice.

Defendant filed a memorandum of costs for $3,388.05. Relying upon the attorney fees provision in the Purchase Agreement, defendant also filed a motion for attorney fees for $28,832.90. Plaintiffs moved to tax costs and opposed the attorney fees motion. As to the latter, plaintiffs argued that the relevant contract was the Deposit Agreement, which had no attorney fees clause. The Purchase Agreement, they maintained, was a separate agreement. According to plaintiffs, defendant had admitted as much in his discovery responses. Plaintiffs also argued that a fee award was precluded by Civil Code section 1717 (hereafter, section 1717), which provides that where a case is voluntarily dismissed, there is no prevailing party. (§ 1717, subd. (b).)

The trial court denied plaintiffs' motion to tax costs, finding that defendant was the prevailing party within the meaning of Code of Civil Procedure section 1032. The court agreed with plaintiffs that defendant was not entitled to his attorney fees, finding:

"1. The court finds that the purchase agreement, pursuant to which Defendant was seeking an order for attorney's fees, was a separate agreement from the agreement for lot line adjustments between Plaintiffs and Defendant. This finding is based on Defendant's verified responses to form interrogatories in which Defendant stated that the purchase agreement and the lot line adjustments agreement were separate agreements. This finding is also based on the fact that the purchase agreement did not reference or incorporate the lot line adjustments agreement.

"2. The court finds that Civil Code § 1717 controls the determination of whether attorney's fees should be awarded based on clauses set forth in contracts. Specifically, the court finds that Civil Code § 1717[, subdivision] (b)(2), which states that where an action has been voluntarily dismissed, there is no prevailing party, controls the instant case.

"3. The [c]ourt finds that the instant action is predominantly based on contract.

"4. The court finds that there is equally competing evidence that both parties could be viewed as the prevailing party."

III. DISCUSSION

"Whether a party to litigation is entitled to recover costs is governed by Code of Civil Procedure section 1032, which provides, in subdivision (b), that '[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.' For the purpose of determining entitlement to recover costs, Code of Civil Procedure section 1032 defines 'prevailing party' as including, among others, 'a defendant in whose favor a dismissal is entered.' (Code Civ. Proc., § 1032, subd. (a)(4).)" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606 (*Santisas*).) Since plaintiffs voluntarily dismissed their action, defendant is one in whose favor a

dismissal has been entered and, therefore, is the prevailing party within the meaning of Code of Civil Procedure section 1032, subdivision (b). As the trial court correctly concluded, he is "entitled as a matter of right" to recover his costs. However, unless a contract, statute, or law provides otherwise, defendant must pay his own attorney fees. (Code Civ. Proc., §§ 1021, 1033.5, subd. (a)(10).)

Defendant maintains that the Purchase Agreement provides for fees in this case. Paragraph 27 of the Purchase Agreement states, in pertinent part: "In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller." This broadly worded clause arguably provides a contractual basis for an attorney fees award to defendant if he were determined to be the prevailing seller in this case. Although plaintiffs insist that their complaint was not based upon the Purchase Agreement and, therefore, that its attorney fees clause is inapplicable, we need not reach this issue. The trial court's fourth finding, that there was no prevailing party, is dispositive. A brief discussion of the pertinent legal principles reveals why this is so.

1. The Evolution of Attorney Fees Awards in Cases of Voluntary Dismissal

Attorney fees allowed solely by contract were historically considered an item of damages. (*Genis v. Krasne* (1956) 47 Cal.2d 241, 246.) A litigant had to plead and prove the contractual provision in order to recover fees. (*Ibid.*) Where the plaintiff voluntarily dismissed the action, the prevailing defendant had no opportunity to prove his or her contractual entitlement to fees and could not include fees in the memorandum of costs. Thus, attorney fees simply were not recoverable after a voluntary dismissal. (*Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 190, citing *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218 (*Olen*).)

Section 1717, enacted in 1968, created a reciprocal right to attorney fees in contracts with unilateral attorney fee provisions.[1] Fees awarded under it were held to be in the nature of *costs* (*System Inv. Corp. v. Union Bank* (1971) 21 Cal.App.3d 137, 163-164), which ostensibly removed the procedural bar to awarding contractual attorney fees after a voluntary dismissal. But in 1978, our Supreme Court held that contractual attorney fees could not be awarded under section 1717 where the plaintiff had voluntarily dismissed the action. (*Olen, supra*, 21 Cal.3d 218.) *Olen* acknowledged that under the cost statutes, a defendant in whose favor a dismissal had been entered was entitled as a matter of right to recover his costs and that attorney fees were recoverable as costs if authorized by statute or agreement. (*Id.* at p. 225.) *Olen* held, however, that the parties should bear their own attorney fees in pretrial dismissal cases, whether the claim for fees was based on a contractual provision or on the reciprocal right provided by section 1717. (*Olen, supra*, at p. 223.) *Olen* had two reasons for this holding. First, as it then read, section 1717's definition of "prevailing party" did not encompass a defendant in whose favor a dismissal had been entered. (*Olen, supra*, at p. 222.) Second, and more

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[1] In its present form, section 1717 provides, in pertinent part:

"(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] . . . [¶] Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit. [¶] . . . [¶]

"(b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

"(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section."

importantly, for our purposes, *Olen* reasoned that automatically awarding attorney fees as costs in the case of a pretrial dismissal was inconsistent with the equitable purposes of section 1717. (*Olen*, *supra*, at p. 224.)

Olen held that contractual provisions for attorney fees were not to be enforced inflexibly but that "equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction." (*Olen*, *supra*, 21 Cal.3d at p. 224.) "Because award of contractual attorney fees is governed by equitable principles, we must reject any rule that permits a defendant to automatically recover fees when the plaintiff has voluntarily dismissed before trial. Although a plaintiff may voluntarily dismiss before trial because he learns that his action is without merit, obviously other reasons may exist causing him to terminate the action. For example, the defendant may grant plaintiff--short of trial--all or substantially all relief sought, or the plaintiff may learn the defendant is insolvent, rendering any judgment hollow. . . . Moreover, permitting recovery of attorney fees by defendant in all cases of voluntary dismissal before trial would encourage plaintiffs to maintain pointless litigation in moot cases or against insolvent defendants to avoid liability for those fees." (*Ibid*.)

Olen concluded that "concern for the efficient and equitable administration of justice" required that defendants in pretrial dismissal cases bear their own attorney fees. (*Olen*, *supra*, 21 Cal.3d at p. 225.) The Legislature codified the *Olen* holding in subdivision (b)(2) of section 1717, which provides, "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." (Stats. 1981, ch. 888, § 1, p. 3399.)

In 1998, *Santisas*, *supra*, 17 Cal.4th at page 602, held that section 1717, subdivision (b), applied only to causes of action on the contract, not to torts or other noncontractual causes of action to which a contractual attorney fees clause might apply. (*Santisas*, *supra*, at p. 602.) *Santisas* held that in the latter case, although a fee award was not precluded by section 1717, subdivision (b), the defendants were not automatically

entitled to an award of fees simply because Code of Civil Procedure section 1032 defined them as prevailing parties. (*Santisas, supra,* at p. 621.) According to *Santisas,* although both *Olen* and section 1717, subdivision (b) apply only to contractual claims, *Olen*'s analysis of the equitable concerns bearing upon voluntary pretrial dismissals is applicable to voluntary dismissals where entitlement to fees is based on contract but the litigation is based in tort or other noncontractual theories. "In particular, it seems inaccurate to characterize the defendant as the 'prevailing party' if the plaintiff dismissed the action only after obtaining, by means of settlement or otherwise, all or most of the requested relief, or if the plaintiff dismissed for reasons, such as the defendant's insolvency, that have nothing to do with the probability of success on the merits." (*Santisas, supra,* at p. 621.)

In contrast to *Olen,* however, *Santisas* declined to adopt an automatic-denial rule. The court explained: "[W]e do not agree that the only remaining alternative is an inflexible rule denying contractual attorney fees as costs in all voluntary pretrial dismissal cases. Rather, a court may determine whether there is a prevailing party, and if so which party meets that definition, by examining the terms of the contract at issue, including any contractual definition of the term 'prevailing party' and any contractual provision governing payment of attorney fees in the event of dismissal. If, as here, the contract allows the prevailing party to recover attorney fees but does not define 'prevailing party' or expressly either authorize or bar recovery of attorney fees in the event an action is dismissed, a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives whether by judgment, settlement, or otherwise." (*Santisas, supra,* 17 Cal.4th at pp. 621-622; see *Chinn v. KMR Property Management, supra,* 166 Cal.App.4th at pp. 190-193, discussing history of § 1717.)

In sum, assuming that the Purchase Agreement and its attorney fees provision applies to the current dispute, and recognizing that plaintiffs have dismissed the entire

action, defendant is barred by section 1717, subdivision (b) from recovering fees incurred defending the contract claims but is not barred from recovering fees incurred in connection with the fraud cause of action. However, he is not entitled, as a matter of right under Code of Civil Procedure section 1032, to recover those fees as costs. His recovery depends upon the terms of the Purchase Agreement and the trial court's assessment of the prevailing party.

Paragraph 27 of the Purchase Agreement allows reasonable attorney fees and costs to "the prevailing Buyer or Seller." The agreement does not refer to voluntary dismissal and does not define prevailing buyer or seller. Accordingly, the trial court was bound to apply a pragmatic definition of prevailing party, taking into account the extent to which the parties realized their litigation objectives.

2. The Trial Court's Determination of Prevailing Party

The trial court concluded that the evidence showed that either side could have been considered the prevailing party. That is, neither side prevailed. The trial court's determination of prevailing party is an exercise of discretion that we do not disturb absent a clear showing of abuse. (*Jackson v. Homeowners Assn. Monte Vista Estates-East* (2001) 93 Cal.App.4th 773, 789.) There was no abuse here.

It is clear that plaintiffs' litigation objectives were to get the lot line changes accomplished or get their money back and to recoup damages for the loss of use of the $1.1 million during the time they were wrongfully prevented from building upon the property. Defendant's litigation objective was, presumably, to avoid monetary liability to plaintiffs. Plaintiffs prevailed in their contract claims in that the changes they sought were accomplished after they filed the lawsuit. Indeed, they dismissed the suit just two months after the deeds were recorded.

Defendant points out, however, that the fraud cause of action is the only one for which he could have received a fee award and, since plaintiffs did not obtain any damages, defendant was necessarily the prevailing party. We disagree. The gravamen of

plaintiffs' contract claim was that defendant had not conveyed the property he had promised to convey. The wrongful act alleged in connection with the fraud cause of action was essentially the same: defendant had promised to convey property he never intended to convey. Recordation of the deeds that adjusted the lot lines gave plaintiffs substantially all of what they wanted and limited damages on the tort claim. It is true that plaintiffs failed to obtain any damages for the alleged fraud. But their failure to pursue what was left of the case after the deeds were recorded could as easily have been based upon a comparison of the costs and potential benefits of trial as upon a determination that the claim had no merit.

Defendant maintains that plaintiffs must have proven that the lawsuit actually caused defendant to change his conduct. We disagree. In a private attorney general case (Code Civ. Proc., § 1021.5), when the suit becomes moot due to the defendant's change in conduct, the plaintiff must establish that the suit was the catalyst for the change in order to obtain an award of attorney fees. (*Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 576.) This is not a private attorney general case. Moreover, plaintiffs do not claim to have prevailed nor did the trial court find that they had. This was a simple tort cause of action in which there was no clear win by either side. Accordingly, the issue was subject to the trial court's broad equitable discretion. (*Jackson v. Homeowners Assn. Monte Vista Estates-East*, *supra*, 93 Cal.App.4th at p. 788.) On the facts, the trial court's ruling that there was no prevailing party was not an abuse of discretion.

IV. DISPOSITION

The order of the trial court denying defendant's motion for attorney fees is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.